in section 9(1)(a) are "failing in his duty", that their meaning is wider than the meaning of the word "negligence", that in view of subsection (2) of section 9 the legislature may not have intended to excuse Government from liability for the negligence of their servants, that failure of duty must be proved by those relying on it, that following *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority*[1] the onus of proving that is on the Government and that since as yet there was no such proof the defence contention must be dismissed.

With respect it is difficult to follow the learned judge's reasoning regarding failure of duty, as arguments were advanced by Mr. Lim on the basis that there had been a failure of duty on the part of some one in the Post Office. Otherwise, there would not have been any mistake in the content of the telegram received by the Singapore firm.

With respect, the learned judge was in error in holding that Government has no defence.

This is not like the run-of-the-mill running down cases involving, say, a PWD lorry driver who ran down and injured the plaintiff who then sues in negligence both the Government as the driver's employer and the driver as the Government's agent or servant. In this case the plaintiff has not sued the Post Office employee who actually transmitted the telegram. It sued only the Government — in negligence as already stated.

Here it is important to observe that section 9 draws a distinction between the liability of the Government and the liability of their telecommunication officers.

As regards the latter, subsection (2) clearly provides that a telecommunication officer is liable for any loss occasioned by a mistake in a telegram if he caused the loss "negligently, maliciously or fraudulently." As regards Government on the other hand, subsection (1) clearly provides that "Government shall not be responsible for any loss or damage which may occur in consequence of any telecommunication officer failing in his duty with respect to the receipt, transmission or delivery of any message." No words can be clearer than these to absolve Government in the circumstances of this case from liability for damages caused by failure of duty on the part of the Post Office employees concerned, even if such failure has been proved to the hilt.

Parliament by the Telecommunications Act has given the Post Office a monopoly in running the telegraphic service. It is a vital public service. In determining charges for telegrams, the Post Office must have had regard to the exemption from liability given to it by section 9; if Government is to be held liable for over $18,000 in return for the few dollars charged for this telegram, the public would have to be asked to pay prohibitive charges for telegrams.

With respect we do not agree that section 9 is similar to rule 91(1) of the Port Swettenham Authority Rules, 1965. There the words which follow the word "unless" show that the Authority does not enjoy absolute exemption from liability, and is liable if loss has been caused solely by the misconduct or negligence of the Authority or its officers and servants. Here, on the contrary, subsection (1) of section 9 emphatically states that Government shall not be responsible for any loss occasioned by any telecommunication officer failing in his duty with respect to the transmission of any message. If indeed, the plaintiff can prove such failure amounting to negligence, he may sue the officer. It is, however, unlikely that any plaintiff can find such proof, in the labyrinth of the bureaucracy. But presumably the Post Office will take disciplinary proceedings against him, and in extreme circumstances the Public Prosecutor may even prosecute him under Part IV of the Act.

Rule 3 of the Telegraph Rules also makes abundantly clear that Government is not liable for loss or damage caused by inaccuracy of or error in telegrams.

Fcr the above reasons, we would allow this appeal with costs.

Appeal allowed.

Solicitors: *Tai & Co.*

SORNARATNAM & ANOR. v. RAMALINGAM

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 4 & September 16, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 117 of 1979]

Practice and Procedure — Appeal — Finding of fact by trial court —Appellate court not entitled to overrule finding.

In this case the learned President of the Sessions Court had held after hearing the evidence that the monthly payments amounting to a total of $4,600 made by the respondent were paid not towards the repayment of the loan of $5,000 but by way of profits from the commercial venture which the respondent was then undertaking partly with the money borrowed from the appellant's husband. He therefore gave judgment for the appellant for the $5,000. On appeal the learned judge of the High Court disagreed with this finding and ordered a retrial.

Held: the finding of fact by the President, Sessions Court was one made by him not only in the setting of the demeanour of the witnesses whom he had the advantage of seeing and hearing but also as a matter of reasonable inference from evidence which was common to both sides. Such a finding was clearly one which no appellate court was entitled to overrule.

Case referred to:-

(1) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.

FEDERAL COURT.

C. Jegathesan for the appellants.

H.B. Ball for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal from the decision of the High Court which overruled the judgment of the President Sessions Court in favour of the appellant in her action for money had and received.

There is no serious dispute of facts, save on one matter. The appellant's husband had in his lifetime lent the respondent two sums of money, $20,000 in the first instance and then $5,000. It is common to both that the $20,000 had been repaid, and also that the respondent had been making monthly payments of $100 to the appellant to the total sum of $4,600. The dispute is over the nature of these monthly payments. If they were towards repayment of the sum

of $5,000, then a balance of $400 was outstanding and judgment should be entered for the appellant for $400. Otherwise there must be judgment for the appellant in the sum of $5,000 claimed by her. The question therefore before the trial court was one of fact: what was the nature of the monthly payments?

On this issue and on a consideration of the evidence adduced before him, the President Sessions Court came to a definite finding that the $4,600 was paid not towards the repayment of the loan of $5,000 but by way of profits from the commercial venture which the respondent was then undertaking partly with the money borrowed from the appellant's husband. He considered the evidence that the respondent had given the appellant a cheque for $5,000 as security for the loan if not conclusive against, at least disproving, the contention that only a sum of $400 remained due and owing. Accordingly, he gave judgment for the appellant for $5,000.

The learned judge, on appeal, thought this reasoning faulty. He considered it as not unlikely for a security to be given for $5,000 against a debt of $400. As has been observed, if he thought, against the finding of the President Sessions Court, that the appellant had not proved her claim on a balance of probabilities, he should have substituted a judgment for $400 on the admission that this sum remained outstanding from the loan of $5,000. Instead, however, he set aside the judgment of the President Sessions Court and ordered a retrial. He was clearly of the opinion that the evidence led by the respondent was unsatisfactory. Learned counsel for the respondent at the appeal (who did not appear in the Sessions Court) conceded that that was so, but was glad to be given a second chance to prove his client's case.

With respect, it seems to us that the finding of fact by the President Sessions Court is one made by him not only in the setting of the demeanour of the witnesses whom he had the advantage of seeing and hearing but also as a matter of reasonable inference from evidence which was common to both sides. A deposit of a security for $5,000 renewed subsequently after the substantial payments had been made is perhaps more indicative of the fact that the payments were not made towards repayment of the loan, as the President Sessions Court thought and found. Such a finding is clearly one which no appellate court is entitled to overrule.

As Lord Russell of Killowen said in delivering the recent judgment of the Privy Council in *Oh Hiam & Ors.* v. *Tham Kong.*[1]

"...The Federal Court... sought to analyse the Notes of Evidence, arriving at a diametrically opposite view to that taken by the trial judge on which evidence should be accepted. This approach in an appellate court is on general principle very rarely acceptable, as has more than once been said by the Board, notably recently in *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41."

The appeal was accordingly allowed with costs here and in the High Court and the judgment of the President Sessions Court restored.

Appeal allowed.

Solicitors: *Jegathesan & Co.; H.B. Ball.*

ABDUL GHANI BIN JUSOH & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) February 26 & September 23, 1980]

[Kuala Lumpur — Federal Court Criminal Appeal No. 18 of 1979]

Criminal Law and Procedure — Admissibility of cautioned statements — Statements made in the course of police investigations — Statements unsigned — Statement made to probationary inspector — Whether statements admissible — Criminal Procedure Code (F.M.S. Cap. 6), ss. 112(i), 112(v) and 113.

In this case the appellants had been convicted of offences under section 304 of the Penal Code. The case against the appellants relied largely on the admissibility of the cautioned statements made by them. The statements were unsigned and the statement of the first appellant was made to a Probationary Inspector. The learned trial judge admitted the statements in evidence. The appellants appealed.

Held, allowing the appeals: (1) as the statements were not signed or thumbprinted, and since no adequate reason was advanced for the failure to obtain the signature or thumbprint of the appellants, the statements were inadmissible in evidence;

(2) the statement recorded by the Probationary Inspector was not a statement recorded in accordance with section 113 of the Criminal Procedure Code and was therefore inadmissible.

Cases referred to:-

(1) *Lim Kim Chuan* v. *Public Prosecutor* [1948] M.L.J. 117.

(2) *Gartside* v. *I.R.C.* [1968] A.C. 553, 612.

(3) *Young & Co.* v. *Mayor etc. of Leamington* (1883) 8 App. Cas. 517, 526.

(4) *Public Prosecutor* v. *Ng Goh Weng & Anor.* [1979] 1 M.L.J. 127.

FEDERAL COURT.

T. Mura Raju for the first appellant.

Mahinder Singh (*P. Selvam* with him) for the second appellant.

T.S. Sambathamurthi (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J.: We allowed the appeals against conviction and sentence by both the appellants and acquitted and discharged both of them some time ago at which time we promised to give our written reasons for so doing, being acutely aware that the issues of law raised in the course of this appeal are of great public interest.

The arguments in this appeal were founded on two main grounds. Firstly learned counsel for the appellants complained that both the statements alleged to have been made by both appellants were unsigned and therefore not admissible in evidence. Secondly that alleged to have been made by the 1st appellant had the additional defect of having been recorded by a Probationary Inspector contrary to statutory requirement, and for that reason as well become inadmissible.

The appellants were charged with an offence punishable under section 302 of the Penal Code read together with section 34 of the Penal Code.

They were found guilty of an offence under section 304 of the Penal Code and were both sentenced to 10 years' imprisonment.

Briefly the case for the prosecution is that the